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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

GESKE & SONS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150 AND CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION 301,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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1. The recently decided case of *Unbelievable, Inc. v. NLRB*, No. 96-1209 (D.C. Cir. July 18, 1997), does not affirm the Board's power to "award attorneys' fees as damages" as alleged. Supp. at 2. The decision also does not "undercut[] petitioner's suggestion" of a circuit court conflict. Supp. at 2. In fact, neither point is addressed by the D.C. Circuit in *Unbelievable, Inc.* That the Board resorts to quoting the dissent of Judge Wald as direct support for Board orders of fee reimbursement in "baseless litigation" cases, accentuates the need for this Court's supervisory review here.

As the majority in *Unbelievable, Inc.* carefully explained, that case is first and foremost one where the union is a certified bargaining representative, an employee had been fired for engaging in protected activity, and the employer had engaged in surface bargaining. The Board had ordered the employer to pay the union's bargaining expenses and also to pay the union's and General Counsel's attorneys' fees for expenses incurred before the Board.

As the D.C. Circuit observed and as Petitioner Geske had pointed out in its Petition at 23, the Board had previously ordered fees only where defenses before it were "frivolous rather than debatable." 7a. If the defense turned on issues of credibility, the case could not be frivolous. 7a-8a; Pet. at 23. After reviewing the caselaw of this Court, especially *Summit Valley Ind., Inc. v. Carpenters*, 456 U.S. 717 (1982) and *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240 (1975), and *J.P. Stevens & Co., Inc. v. NLRB*, 458 U.S. 1118 (1982), *vacating*, 668 F.2d 767 (4th Cir) (where the circuit court approved a Board litigation fee award), the D.C. Circuit concluded that the Board could order the employer to reimburse union negotiating expenses, but lacked the authority to order it to pay the litigation expenses of the charging party or the General Counsel inasmuch as the negotiating cost remedy involves the Board's expertise in labor relations whereas the fees "remedy" is punitive and outside the agency's expertise. *Unbelievable, Inc.*, Supp. at 24a.[1]

On these rulings, the Board claims that the *Unbelievable, Inc.* decision reaffirms its powers under *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), despite the fact that the Board admits it intends to ask for a rehearing in *Unbelievable, Inc.* Supp. at 2 n2. However, *Bill Johnson's Restaurants* played no central role in the D.C. Circuit's holding. In a footnote only did the *Unbelievable, Inc.* Court cite *Bill Johnson's Restaurants* and only because the intervenor union "misconstrue[d] that case." Supp. 26a-27a n.***.

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[1]The Board admits that its fee award was imposed "as *damages*" against Geske. Supp. at 2. This punitive action is contrary to *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940) and *Wisconsin Dep't of Ind. v. Gould, Inc.*, 475 U.S. 282, 288 n.5 (1986), where the Court explained that "[t]he regulatory scheme established for labor relations by Congress is 'essentially remedial,' and the Board is not generally authorized to impose penalties for the purpose of deterrence or retribution." The Seventh Circuit below rested its ruling in favor of Board authority to award fees to an uncertified union, upon "[a]n adequate deterrent" and "an economic disincentive for engaging in such conduct," because a union may play a "part" in organizing employees. 22a-23a. Both reasons are punitive factors and not in harmony with an Agency remedial order that acts to make whole employees and to protect a specific Section 7 right that has been transgressed. Neither remedial purpose is or has been asserted here.

Accordingly, the holding in *Unbelievable, Inc.*, does nothing to dispute the conflict caused by the Seventh Circuit in *Geske & Sons, Inc. v. NLRB* with the decision of the Sixth Circuit in *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237 (6th Cir. 1995). The dispute is firmly cast between the Board's new assumption of power to award fees to any person, including uncertified labor unions under *Bill Johnson's Restaurants* and its rejection of the limitation that the failure to possess Section 7 rights is "a distinction 'of substance'" between employees and nonemployees under the Labor Act, as found by the Court. *Lechmere, Inc.*, 502 U.S. 527, 537 (1992).

2. Since the Board brought the *Unbelievable, Inc.* decision to the Court's attention, the Court is aware that the D.C. Circuit has now categorically rejected Board authority under Section 10(c) of the Labor Act for imposing attorneys' fees as a remedy for litigation before it. In doing so, the court found when the Board makes such an award it "moves away from its expertise in labor relations and exercises a discretionary power entrusted to a court only when specifically legislated." Supp. at 23a. It observed that the Board's efforts to issue fee awards "focuses not upon the dynamics of the workplace but upon the employer's (or union's) conduct in litigation." Supp. at 24a. These reasons it found are outside the agency's expertise. *Id.*

The rationale for permitting Board fee awards also flies headward into the rationale for preserving the American Rule—that it depletes the resources of a party and would serve as a deterrent to frivolous litigation. Supp. at 23-24a. The former is a general criticism of the American Rule the Court previously rejected in *Summit Valley*, 456 U.S. at 725. As to the latter: "[t]o the extent that the power to shift fees is justified as a deterrent to frivolous litigation, however, the power is punitive and therefore beyond the Board's delegated authority." *Id.* at 724; Supp. at 25a.[2]

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[2]Because *Unbelievable, Inc.*, represents a "substantial change" in controlling caselaw, it qualifies as an extraordinary circumstance for consideration here. *Sure-Tan, Inc.*, 467 U.S. at 896 n.7. The issue also comprises a "subsidiary question" within the meaning of Supreme Court Rule

(continued...)

These same reasons, to the extent that they are accepted by the Court, draw into question the fundamental issue whether the fee remedy announced in *Bill Johnson's Restaurants* should be reconsidered. The entire discussion in *Bill Johnson's Restaurants* addressed the Board's ability to issue a cease and desist order to end the state litigation. Only in one sentence at 731 U.S. at 747, did the Court state the "Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses." Given that the Court undertook no analysis of the remedy the Board might *potentially* award there, under the reasoning of the D.C. Circuit, there should be no such remedy possible, because "[e]ven assuming that attorney's fees are necessary to achieve full compensation, this justification alone is not sufficient to create an exception to the American Rule in the absence of express congressional authority." *Summit Valley*, 456 U.S. at 724-25.[3]

Since the Labor Act is silent in both Sections Section 10(c) and 303 on the question of fees, to impose them via congressional silence through Board discretion ("affirmative action") is inconsistent with the Court's holding in *Summit Valley*. "Any perceived deficiencies in the NLRA's existing remedial arsenal *can only* be addressed by congressional action." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 904 (1984) (also explaining the Court's concern that *Bill Johnson's Restaurants* was not intended to deprive an employer access to a state remedy for state injuries, 467 U.S. at 896-98) (emphasis added). The anomaly between the Board's silent statutory

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[2](...continued)
14.1(a) and is addressed in Geske's *Amended Revised Exception 84* to the Board, as well.

[3]The fees question has fully escaped appellate review. In *Makro, Inc. (dba Loehmann's Plaza)*, 305 N.L.R.B. 663, 671 (1991), the Board first imposed an attroneys' fee award against an employer for its lawsuit to prevent union trespass. Because of *Lechmere, Inc. v. NLRB*, the case was returned from the Sixth Circuit and from there, resurfaced in 1995 in *Makro II*, 316 N.L.R.B. No. 24 (1995), *aff'd, United Food & Comm. Workers, Local 880 v. NLRB*, 74 F.3d 292 (D.C. Cir. 1996). In *Makro II*, the Board dismissed the ULP complaints, but reaffirmed its 1991 fee award analysis in *Makro I*. Hence, the methodology has never been reviewed. This history is reviewed by the ALJ at Pet. 99a-101a.

power to award fees under *Bill Johnson's Restaurants*, its inability to award in all other situations, and the Court's holding that "full compensation" is not an objective of the Labor Act or the American Rule in *Summit Valley*, is obvious.

It would also be anomalous for the Board to be empowered by Section 10(c) to award attorneys' fees as a remedy for a union violation of the secondary boycott provision of Section 8(b)(4), 29 U.S.C. §158(b)(4), of the Labor Act, whereas the federal courts cannot impose the same remedy for violations through its concurrent jurisdiction over secondary boycotts under Section 187, 29 U.S.C. § 303, under *Summit Valley*.

This case raises important questions concerning the Labor Act's remedies that require this Court's attention.

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The petition for a writ of certiorari issue should be granted for the reasons set out herein and in the Petition.

Respectfully submitted,

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